IN THE HIGH COURT OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

(DC) CIVIL APPEAL NO. 18 OF 2019

(Arising from the District Court of Dodoma at Dodoma in Application No. 21 of 2018)

MARO MACHANGE MARO .....APPELLANT

VERSUS

1. AUGUSTINO KATIKIRO
2. KONDOA AUCTION MART & COURT BROKERS **.....RESPONDENTS**

20/4/2020 & 18/5/2020

JUDGMENT

MASAJU, J.

The Appellant, Maro Machange Maro, who lost a Chamber Summons Application No. 21 of 2018 in the District Court of Dodoma (The trial Court) for extension of time to file an application for setting aside dismissal order, dated the 26th day of June, 2013 in Civil Case No. 12 of 2012, appeals to the Court against the trial Court's decision. The appeal is pitted against Augustino Katikiro and Kondoa Auction Mart & Court Broker, the 1st and 2nd Respondents respectively (The Respondents).

The Appellant's Memorandum of Appeal is made of four (4) grounds and six (6) prayers thereof, thus;

"1. That the Honourable District Court erred in law and fat by failure to consider all reasons and causes advanced by the Appellant for the delay.

2. That the Honourable District Court erred in law and fact by failure to sufficiently consider the issue of illegality as a ground for extension of time.

3. The Honourable District Court erred in law and in failing to appreciate that the dispute should be determined on merits.

4. That the Honourable District Court wrongly and illegally exercised discretion to decline an application for extension of time."

It is proposed to ask the Honourable High Court of Tanzania for the following orders:

i. That the appeal be allowed,

ii. That the Ruling and Drawn order of the District Court of Dodoma at Dodoma delivered on 27th May 2019 by Honourable Kirekiano, RM in Miscellaneous Application Number 21 of 2018 be revised or set aside,

iii. The Appellant be allowed to file an application for setting aside dismissal order delivered by Hon. Luvanda, SRM on 23rd June 2013 in Civil Case No. 12 of 2012.

iv. That the District Court of Dodoma at Dodoma should be directed to hear and determine the Appellant's application to set aside dismissal order delivered by Hon. Luvanda, SRM on 23rd June 2013 in Civil Case No. 12 of 2012.

v. That the Respondents to bear costs of this Appeal and that of the lower Court in Misc. Application No. 12 of 2018.

vi. Any other order or relief as this Honourable Court deems fit"

The Respondents contest the appeal and they did severally file their Replies to the Memorandum of Appeal to that effect. The 1st Respondent's Reply to the Memorandum of Appeal reads thus;

"1. That, the complaint in the 1st ground of appeal lacks merits in view of the fact that the District Court carefully took into account all reasons advanced by the Appellant as cause for the delay in lodging the Application and found to be meritless thus properly dismissed the same.

2. *That, the complaint in the 2nd ground of appeal is baseless owing to the fact that the assertation of illegality was not proved to exist in the intended application to set aside the dismissal, as such the District Court cannot be faulted anywhere.*

3. *That, the complaint in the 3rd ground of appeal holds no water in view of the fact that determination of disputes on merits cannot override clear provisions of law guiding parties on how they should do to achieve it. The District Court properly observed the need to do so but was not convinced by the reasons advanced by the Appellant.*

4. *That, the District Court was justified in dismissing the Application for extension of time on the ground that no justifying reasons were adduced by the Appellant as such properly exercised its discretion.*

WHEREFORE the Respondent prays for dismissal of the entire appeal with costs."

The 2nd Respondent, on his part, his Reply to Memorandum of Appeal reads, thus;

"1. THAT, content of paragraph 1 of the Memorandum of appeal is noted

2. *THAT, content of paragraph 2 of the Memorandum of appeal is noted.*

3. *THAT, content of paragraph 3 of the Memorandum of appeal is noted.*

4. *THAT, content of paragraph 4 of the Memorandum of appeal is noted.*

WHEREAS, the second Respondent prays to your Honourable High court to dismiss this appeal with costs especially in sub paragraph No. V which the Appellant insisting that the Respondents to bear costs of this appeal and furthermore that the second Respondent prays to your Honourable High Court that the Appellant also to bear costs incurred by the Respondents from the RM's Court of Dodoma up to this Honouble High Court of Tanzania Dodoma respectively (sic)."

When the appeal was heard in the Court on the 20th day of April, 2020 the learned counsels Sosteness Mselingwa appeared for the Appellant and Lucas Komba appeared to the 1st Respondent. The 2nd Respondent appeared in person. The parties argued the appeal alongside their pleadings and their submissions in the trial Court. Infact, the Respondents adopted their pleadings to form part of their submissions against the

appeal, as they prayed the Court to dismiss the appeal with costs, for want of merit.

The appellant prayed the Court to allow the appeal with costs along with the prayers (i – vi) thereto.

That said, as the Court zero in considering the appeal, the Appellant's pleadings (Affidavit) in the impugned application for extension of time to file application for setting aside dismissal order in the trial Court are instructive to the Court. The said Affidavit that was sworn by Daniel B. Welwel then the Appellant's counsel richly gives the background and the reasons for the said Application. The said Affidavit*, inter alia,* shares the number of suit and Applications filed in the trial Court and in the Court in vain ever since the dismissal of the Civil Case No. 12 of 2012 by the trial Court on the 26th day of June 2013 for non-appearance of the Appellant on the day his suit had been scheduled for hearing. The Appellant's counsel was not well informed when he filed a fresh Civil Case No. 33 of 2012 on the 9th day of July, 2013 upon the dismissal of the Civil Case No. 12 of 2012 on the 26th day of June, 2013. The said suit was struck out of the trial Court for being *res-judicata* on the 16th day of December, 2013. Paragraphs 10 – 19 of the Affidavit are self-evident. That, the Appellant's Chamber Summons Application dated the 4th day of February, 2014 for extension of time to file

Application for setting aside the impugned dismissal order was denied registration by the then acting Deputy Registrar administratively allegedly for being time barred (paragraphs 20 – 23 of the Affidavit). The Appellant's counsel then on the 24th day of April, 2014 unsuccessfully wrote the Deputy Registrar so that the Court can exercise its supervisory and revisionary powers against the trial Court's rejection of the said Chamber Summons Application (paragraphs 24 – 26 of the Affidavit). The Appellant then on the 18th day of October, 2014 filed in the Court Revision Application No. 7 of 2014. The said Application was struck out of the Court on the 14th day of December, 2016 for wrong citation of enabling provision (paragraphs 27 – 28 of the Affidavit). Thereafter the Appellant on the 23rd day of December, 2016 filed in the Court Misc. Civil Application No. 4 of 2017 but later on he withdrew it from the Court on the 20th day of September, 2018, allegedly on advice by the Court (Paragraphs 29 – 32 of the Affidavit). The Appellant ultimately on the 13th day of November filed in the trial Court the Miscellaneous Application No. 21 of 2018 which is the subject of this appeal. It is also worth noting here that the Appellant's advocate in paragraph 7 of the Affidavit alleges that on the 25th day of June, 2013 he went to Arusha in order to attend family emergency, but the said alleged family emergency was neither disclosed thereof nor in the record of proceedings of the trial Court. The alleged telephone communication between the said

advocate and one Julius Bwanga (paragraphs 9 – 12 of the Affidavit) was not proved before the trial Court for want of the alleged communication transcript given by their service providers. After the alleged communication it turned out that the said Julius Bwanga had not presented to him the truth of what transpired in the trial Court on the 26th day June, 2013 when the Appellants' suit was dismissed for want of prosecution.

The Affidavit is also silent in whether or not the learned counsel, ever shared with his client of the alleged family emergency in Arusha for the Appellant's appearance in person before the trial Court in order to pray for adjournment. Since the Appellant's advocate, according to the Chamber Summons Application pleadings in the trial Court and the Appeal pleadings in the Court were drawn and filed by Asyla Attorneys, it is obvious that the Appellant's Advocate belonged to the law firm, hence in the event of emergency, any attorney, from the said law firm could have entered appearance in the trial Court on the day the suit was scheduled for trial.

It is deponed in paragraph 36 of the Affidavit that there are serious issues of law on the dismissed suit worthy of the attention and adjudication of the trial Court. Yet, the alleged serious issues of law are neither disclosed thereof nor in the record of proceedings of the trial Court, let alone the fact that a

copy of the plaint of the dismissed suit was not annexed to the impugned Application so that the trial Court would be in a position to consider them accordingly.

The Appellant in his 2nd ground of appeal alleges illegality as a ground for extension of time. But the said ground was not pleaded in the Chamber Summons Application and the Affidavit thereof. The record of proceedings of the trial Court reveal that the Appellant's learned counsel Ms. Blandina Kihampa submitted during the hearing of the application on the 14th day of March, 2019, thus:

> *"We thus submit that the order refusing the application was illegal we thus submit that the case* ***P.S. Ministry of Defence Vs D.P. Valambia 189."***

In the first place, there was no order that was given by the trial Court when refusing registration of the Application dated the 4th day of February, 2014. The rejection was done administratively. Secondly, since the Appellant withdrew his Misc. Civil Application No. 4 of 2017 from the Court on the 20th day of September, 2018, for the reason given, he is estopped from raising it once more in the Court under section 123 of the Evidence Act [Cap 6].

There is zero doubt that the Appellant spent some time unsuccessfully pursuing legal remedies (proceedings) in the trial Court and in the Court as so well stated in the Affidavit in the trial Court which Affidavit was adopted to form part of the his submission in the trial Court. Under such circumstances, the Appellant could have been considered for extension of time in terms of section 21 of the Law of Limitation Act, [Cap 89] if there was proof that the said proceedings were prosecuted **with due diligence** and **in good faith.** But, as it has already been highlighted herein, the Appellant's actions in the said proceedings were fraught with laxity and want of due diligence, hence his trial and error unsuccessful proceedings both in the trial Court and the Court. That being the case, the 1st and 4th grounds of appeal must be void of merit as well.

The Appellant had deponed in paragraph 37 of the Affidavit that should his application fail, he would be denied his natural justice of access to law and Courts of law, hence his 3rd ground of appeal that the trial Court erred in law by her failure to appreciate that the dispute should be determined on merits. Much as the Court appreciates the right to be heard and the need for disputes to be determined on merit, the Court is sensitive to the constitutional guidance that such right is realized through procedural laws (article 13 (6) (a) the Constitution of the United Republic of Tanzania, 1977). In this

matter the Appellant accessed the trial Court and his suit was scheduled for trial but without notice to the said Court he defaulted appearance himself on the day his suit was scheduled for hearing and the Court enforced procedural law to dismiss the suit for want of prosecution.

The Courts of law which are charged with administration of justice cannot be friendly to any party to dispute who abuses his right to be heard in pursuit of justice lest the Courts become *circus fora*. That is to say, in the exercise of the right to be heard and other intrinsic rights thereof, such as right of appeal and other legal remedies, parties to disputes in Courts of law or tribunals should be punctual, diligent, accountable to the Courts and always acting in good faith as they seek to exercise such rights. In the same vein, advocates, representatives and agents, if any, who appear for the parties in Courts should be punctual, diligent and accountable to the Courts and their clients accordingly in line with advocacy and procedural laws in the interests of justice.

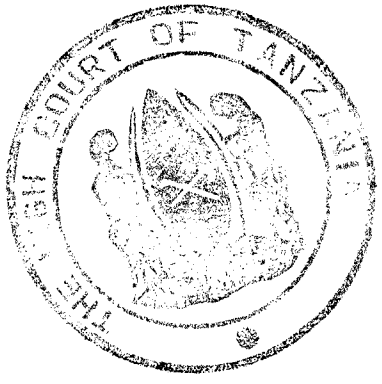
The Courts of law are there essentially for administration of justice. They are not moot courts typical of schools of law or law schools where law students and law graduates respectively learn legal practice. The parties go to Courts in order to get justice, and not to learn how to litigate their disputes. That is why there is legal service to that effect by the learned counsels

or attorneys. So, the parties' advocates, if any, must be diligent in the discharge of their duties, always following up their clients' cases with keen interests lest they compromise their clients' interests.

Since the advocates are engaged in order to represent and appear for their clients who are in most cases laymen, their timely appearance in Courts cannot be overemphasized here. Their non-appearance in Courts, for whatever reason, should be formally made known to the Courts in time lest the Courts, so rightly, in pursuit of control of proceedings in line with procedural law give adverse orders against the defaulting party as it was the case in this matter. That being the case, the good reason, if any, for the non-appearance of the parties in person or their advocates, representatives and agents must be strictly proved before the Courts in order to check either abuse of legal process or unnecessary delay of justice.

The right to be heard must be exercised in time and so exceptionally in the extended time when there is reasonable or sufficient cause, hence the Civil Procedure Code, [Cap 33], the Law of Limitation Act, [Cap 89], and other pertinent procedural laws.

Since there was laxity and want of due diligence on the part of the Appellant in prosecuting his suit and the subsequent proceedings thereof, the trial Court so rightly dismissed the impugned Application for want of reasonable or sufficient cause in terms section 14 (1) of the Law of Limitation Act, [Cap 89]. That being the case, the 3rd ground of appeal equally collapses. The appeal is hereby dismissed in its entirety with costs for want of merits accordingly.



GEORGE M. MASAJU

JUDGE

18/5/2020